



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 30, 1995

Mr. John L. Schomburger
Assistant District Attorney
Collin County Courthouse
210 S. McDonald, Suite 324
McKinney, Texas 75069

OR95-1338

Dear Mr. Schomburger:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 34626.

The Collin County District Attorney received two open records requests for certain documents pertaining to the prosecution of an alleged incident of sexual assault. The first request seeks a copy of a settlement agreement between the victim and her alleged assailants. The second request seeks an "affidavit of non-prosecution" signed by the same victim.

The requested settlement agreement apparently was submitted directly to the Collin County Grand Jury during its deliberations regarding the alleged assault. Because you now possess a copy of the settlement, we assume that your office is holding that record on behalf of the grand jury. In Open Records Decision No. 513 (1988), this office concluded:

The Open Records Act does not apply to information within the actual or constructive possession of the grand jury. When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information held or collected by the agent is within the grand jury's constructive possession.

Assuming your office in fact is serving as the grand jury's agent in maintaining the settlement agreement, the agreement is in the constructive possession of the Collin County Grand Jury. Because the grand jury, as an extension of the judiciary, is not a "governmental body" subject to the provisions of the Open Records Act, *see* Gov't Code §§ 552.003(b), the settlement agreement does not constitute "public information" as defined in section 552.021(a) of the Government Code. Open Records Decision No. 513 (1988) and authorities cited therein. Accordingly, you need not honor the open records request for this document.

On the other hand, we cannot conclude, based on the information you have provided us, that the "affidavit of non-prosecution" signed by the victim of the alleged assault was either collected or is currently being maintained by your office on behalf of the grand jury. On the contrary, it appears that your office received this record during the course of the then pending prosecution of the alleged assailants. Consequently, unlike the settlement agreement discussed above, you collected this record while serving not as an agent of the grand jury but rather as a state prosecutor acting in his sole capacity. Information gathered by a district attorney independently of any request or direction of the grand jury, even where that information was subsequently submitted to the grand jury, may not be withheld from the public under the judicial exception found at section 552.003(b). Open Records Decision No. 513 (1988). We therefore must determine whether any of the exceptions to required public disclosure that you have raised under subchapter C, chapter 552 of the Government Code, apply to the affidavit.

You contend that the affidavit of non-prosecution may be withheld from the public pursuant to the "informer's privilege" as incorporated into section 552.101 of the Government Code. The "informer's privilege" aspect of section 552.101 protects the identity of persons who report violations of the law to officials responsible for enforcing those laws. *See generally* Open Records Decision No. 515 (1988). Because part of the purpose of the privilege is to prevent retaliation against informants, the privilege does not apply when the informant's identity is known to the individuals who are the subject of the complaint. *See* Open Records Decision No. 208 (1978). Because it is clear in this particular instance that the alleged assailants are fully aware of the identity of their accuser, the informer's privilege is inapplicable here.

You also contend that the affidavit comes under the protection of section 552.108 of the Government Code, the "law-enforcement" exception. When a governmental body claims section 552.108, the relevant question this office must address is whether the release of the requested information would undermine a legitimate interest relating to law enforcement or prosecution. Open Records Decision No. 434 (1986). You have made no such showing that in this particular instance such would be the case. Because you have not met your burden in demonstrating how the release of the affidavit would "unduly interfere with law enforcement," *see Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977), this record may not be withheld from the public under section 552.108.

Finally, we discuss the extent to which the affidavit must be withheld from the public in order to protect the common-law privacy interests of the alleged victim.¹ In Open Records Decision No. 339 (1982), this office concluded that common-law privacy permits the withholding of the name of every victim of a serious sexual offense as well as a detailed description of the assault. Because the affidavit at issue does not contain a description of the alleged assault, or any other "highly intimate or embarrassing" information, *see Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), we conclude that your office must withhold only the victim's identity.² Because none of the remaining information in the affidavit comes under the protection of the exceptions you raised, the remainder of this document must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/RWP/rho

Ref.: ID# 34626

Enclosures: Submitted documents

¹Although you have also raised the attorney-client privilege in your brief, we assume that you meant to make this argument with regard to the settlement agreement only. The attorney-client privilege is clearly inapplicable to the affidavit for non-prosecution.

²In reaching this conclusion, we assume that the victim's name does not appear in any other public record pertaining to the assault. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (no privacy interest exists in information found in public court records).

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